IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs November 18, 2003

STATE OF TENNESSEE v. LARRY LENORD FRAZIER

Direct Appeal from the Circuit Court of Bedford County
No. 15149 Charles Lee, Judge

No. M2003-00808-CCA-R3-CD - Filed January 8, 2004

The Defendant, Larry Lenord Frazier, pled guilty to one count of possession of cocaine for resale, and one count of sale of a substance containing cocaine. Following a sentencing hearing, the trial court denied the Defendant's request for alternative sentencing to community corrections and sentenced the Defendant to serve prison terms of eight years and nine months for the possession for resale conviction, and nine years and four months for the sale conviction, and ordered that the sentences run consecutively. The Defendant appeals, contending that the trial court erred when it denied his request for alternative sentencing to community corrections. Finding no reversible error, we affirm the trial court's judgments.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JOSEPH M. TIPTON and JERRY L. SMITH, JJ., joined.

Andrew Jackson Dearing, III, Shelbyville, Tennessee, for the appellant, Larry Leonard Frazier.

Paul G. Summers, Attorney General and Reporter; Michael Moore, Solicitor General; Elizabeth B. Marney, Assistant Attorney General; William Michael McCown, District Attorney General; and Michael D. Randles, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION
I. Facts

The Defendant was arrested for possession with intent to sell 0.7 grams of a Schedule II drug ("Count 1") and possession with intent to deliver 0.7 grams of a Schedule II drug ("Count 2") on August 3, 2001. See Tenn. Code Ann. § 39-17-417 (1997). While on bond for these offenses, on August 13, 2002, the Defendant was again arrested for the sale of 0.6 grams of a Schedule II drug

("Count 3") and the delivery of 0.6 grams of a Schedule II drug ("Count 4").[1] See Tenn. Code Ann. § 39-17-417. The Bedford County Grand Jury indicted the Defendant on all four counts. The Defendant pled guilty to all four counts, and the parties agreed to allow the trial court to determine the Defendant's sentence. After a sentencing hearing, the trial court merged Count 2 with Count 1 and merged Count 4 with Count 3. The trial court then sentenced the Defendant to eight years and nine months for Count 1 and nine years and four months for Count 3. The trial court ordered that the sentence for Count 3 run consecutively to the sentence for Count 1.

A pre-sentence report, presented by the State and made an exhibit by the trial court, showed that, in addition to the charges arising from the present case, the Defendant was arrested for driving while under the influence of an intoxicant ("DUI") in April of 1985 and in April of 1992. The report showed that the Defendant was cited for failing to use a safety belt or child restraint in June of 2000 and in November of 2001, and the Defendant's license was subsequently revoked for failure to pay the fines associated with those two citations. The report indicated that in June of 1996 the Defendant received a citation for driving with a revoked driver's license, which was reduced to "no driver's license."

At the sentencing hearing, the State called Timothy Lane, the Director of the 17th Judicial District Drug Task Force ("Drug Task Force"), who oversaw drug enforcement operations for a four-county area, including Bedford County. Director Lane testified that he had been the Director for approximately eight years and that he had a good understanding of the drug problem and drug activity in Bedford County.

Director Lane testified that he was familiar with the facts of the cases against the Defendant. He explained that, based on the facts as he knew them, the Defendant was a street level drug dealer. Director Lane explained that street level drug dealers move the most "product," even though each individual sale is a very small quantity. He stated that street level drug dealers are the individuals whom drug addicts seek out for their drug purchases. "[A]ddicts aren't able to come into possession of extremely large quantities of money. . . . It is hard for them to come up with $20 or $10 at a time to go buy a crack rock, so they seek out a street level crack dealer."

On cross-examination, Director Lane admitted that the Defendant spoke with one of the agents of the Drug Task Force "off the record." He stated that the Defendant gave the agent information regarding an ongoing investigation that would "bolster the case against [an] individual, and that individual [is] a major supplier of cocaine base in the Eastern District of Tennessee that [the Drug Task Force] is currently pursuing for federal purposes."

On redirect, Director Lane stated that, while the discussion with the Defendant was "off the record," the Defendant admitted that his involvement in the drug trade extended beyond the four

[1] The original indictments indicate that the Defendant was arrested for Counts 3 and 4 on August 3, 2002, however the State filed a Motion to Amend those indictments, pursuant to Tennessee rule of Criminal Procedure 7, which indicated that the correct offense date was August 13, 2002, not August 3, 2002.

counts for which he was indicted. Director Lane explained that the discussion with the Defendant was part of a deal between the Defendant and the State. The Director testified that the Defendant agreed to help in the State's investigation of other drug dealers with the understanding that, in exchange for his cooperation, he would not be prosecuted in the federal court system. Director Lane further testified that, pursuant to the agreement between the State and the Defendant, any information provided by the Defendant would not be used against him in the federal court system, but that information was not excluded from use during the Defendant's sentencing hearing.

Director Lane stated that, during the discussion, the Defendant admitted to "a substantial amount" of activity in the drug trade. Director Lane explained that the Defendant admitted dealing drugs at the street level for "[a]bout a two-year period." Director Lane testified that:

> [The Defendant] indicated that the individual that we are looking at was supplying [the Defendant] with half-ounce quantities of crack cocaine on a weekly basis, which [the Defendant] would subsequently break down and [sell] and was required to return the majority of those profits to that individual, which would be like the wholesale type person that is in the background and doesn't want to expose himself into being captured by the police, so he uses people like [the Defendant] to basically market his product.

Director Lane then explained that the Defendant told him that he would be "fronted" the drugs by the wholesale dealer with the understanding that he would pay back the wholesale dealer a certain amount of money for the drugs and the Defendant would keep the profits. Director Lane stated that the Defendant said he would break down the half-ounce of crack cocaine into $10 and $20 rocks and make between $1,000 and $1,250 selling the crack cocaine on the street. The Defendant said he would then pay the wholesale dealer $500 for fronting him the crack cocaine and make between $500 and $750 profit per week.

The Defendant testified on his own behalf. He testified that, prior to being incarcerated, he lived at the East Trailer Park and worked for Statum Cab, both in Shelbyville, Tennessee. He stated that he worked as a "contract driver" for Statum Cab since April of 1999. The Defendant acknowledged that he made about $300 per week as a cab driver.

The Defendant admitted that he had prior traffic offenses including DUIs in April of 1985 and April of 1992, driving with a revoked driver's license in June of 1996, which was reduced to "no driver's license," and failing to use a safety belt or child restraint in June of 2000 and November of 2001. The Defendant testified that he attended Buffalo Valley treatment center as part of his sentence on the DUI convictions and completed the program. The Defendant testified that he never graduated from high school nor attempted to get his General Educational Development high school graduation equivalency diploma.

The Defendant explained that he suffered from multiple medical conditions, including high blood pressure, colon problems, and a leg problem that was the result of breaking his leg in a car

accident approximately ten years ago. He stated that he is currently on hydrocodone that was prescribed to him because of residual pain from a car accident. He explained that he has had the colon problems "pretty much all of [his] life," and that he has "been in and out of the hospital with it." The Defendant stated that, in the last five years, he was hospitalized because of the colon problems seven or eight times.

The Defendant admitted that he drank quite heavily earlier in his life, but stopped ten years ago. He explained that "I went to treatment, and then I just made up my mind, I said 'It is over. I'm not going to drink anymore.' And since that time, I found my higher power and have been clean for ten years." He testified that he was never married and has no children.

The Defendant next testified that he spoke with an agent from the Drug Task Force the night before the sentencing hearing and provided the agent with information about an individual whom he believed to be a major drug dealer in Bedford County. He also acknowledged that he was willing to testify for the State in open court against the individual, whether it be in state court or in the federal court system.

The Defendant stated that he spent 48 hours in jail for his first DUI in 1985 and then approximately 45 days in jail for the second DUI charge in 1992. He testified that he "came clean" and cooperated with the police. He explained that he "learned to do the right thing and walk the chalk line." The Defendant testified that "I think–I know I have learned my lesson." He further testified that he would comply with any alternative sentencing issued by the Court, including drug tests, curfews, and public service. The Defendant pled to the judge, "I am willing to do anything you tell me to do, no matter what it is, anything."

On cross-examination, the Defendant testified that, in the eight days that he spent in jail for this offense, he learned not to sell drugs anymore. The Defendant denied drinking heavily while taking the hydrocodone prescribed for his leg pain and colon problems. He stated that the car accident that caused those problems occurred ten years ago, prior to his treatment at Buffalo Valley treatment center, but denied that the accident was caused by drinking and driving.

The Defendant recalled that he was arrested for Counts 1 and 2 on August 3, 2001, at the trailer park and that he posted bond and was released the following day. The Defendant admitted that he "didn't learn from that one day in jail not to sell drugs." The Defendant reported that he was arrested for Counts 3 and 4 on August 13, 2002, when he sold 0.6 grams of crack cocaine to an undercover agent. He acknowledged that he was still on bond from the first arrest when he was arrested the second time. The Defendant first testified that he only sold cocaine "[j]ust one time after" he was arrested the first time. The State then asked, "Are you saying that it just happened–the one time you [sold crack cocaine], it happened to be to an undercover informant, an agent?" the Defendant stated, "I really don't know." When asked the follow-up question, "In fact, . . . it was a whole lot more than just one time you continued to sell drugs after you made bond on your first case?" the Defendant answered, "I guess." The State reminded the Defendant that he was under oath and then asked, "Are you . . . say[ing] that after you got arrested that first time, . . . [you] only one

time [in] an entire year . . . sold crack cocaine?," and the Defendant explained, "I am just going by what that record says." The Defendant reiterated, however, that the last eight days in jail had taught him a "big lesson."

While considering the Defendant's request for an alternative sentence to community corrections, the trial court stated:

> The Court now must turn to whether or not the defendant should be considered for some type of alternative sentencing. The defendant is not eligible for probation. And therefore, the Court should consider only whether or not the defendant is eligible for community corrections.
>
> . . . .
>
> But in this case, the defendant is not eligible for such consideration. First, the defendant has the burden, since both of these are class B felonies, of presenting proof of his worthiness for consideration of alternative sentencing to the Court. And, really, the defendant has only presented to the Court that he is sorry for what he has done; that he has learned a lesson while he has been in jail; and beyond that, has presented little else for the Court's consideration.
>
> The State, on the other hand, has presented proof to the Court that there is the need for deterrence in this matter. And after reading a couple of opinions from the Court of Criminal Appeals that were written in cases that my good friend John Rollins has that . . . were released last week, I am hesitant to take judicial notice as to whether or not a judge can opine that some crime is on the increase, based upon his docket, but the Court need not do that since the State, as it argued, has presented direct evidence through Director Lane that there is the need for deterrence in this case.
>
> Also, the Court takes into consideration that obviously the defendant's potential for rehabilitation is not good since, while the defendant was out on bond, he continued to engage in criminal activity.
>
> All of those things being considered, then the Court denies the defendant's request to be considered for community corrections.

The trial court ordered the Defendant to serve eight years and nine months for the possession for resale conviction, and nine years and four months for the sale conviction, and further ordered that the sentences run consecutively and be served in the custody of the Tennessee Department of Correction.

The Defendant appeals, contending that the trial court erred when it denied him community

corrections sentences.

II. Analysis

When a defendant challenges the length, range or the manner of service of a sentence, it is the duty of this court to conduct a de novo review on the record with a presumption that "the determinations made by the court from which the appeal is taken are correct." Tenn. Code Ann. § 40-35-401(d) (2003). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ross, 49 S.W.3d 833, 847 (Tenn. 2001); State v. Pettus, 986 S.W.2d 540, 543 (Tenn. 1999); State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The presumption does not apply to the legal conclusions reached by the trial court in sentencing a defendant or to the determinations made by the trial court which are predicated upon uncontroverted facts. State v. Dean, 76 S.W.3d 352, 377 (Tenn. Crim. App. 2001); State v. Butler, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); State v. Smith 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994). In conducting a de novo review of a sentence, we must consider: (a) any evidence received at the trial and/or sentencing hearing; (b) the presentence report; (c) the principles of sentencing; (d) the arguments of counsel relative to sentencing alternatives; (e) the nature and characteristics of the offense; (f) any mitigating or enhancement factors; (g) any statements made by the defendant on his or her own behalf; and (h) the defendant's potential or lack of potential for rehabilitation or treatment. See Tenn. Code Ann. § 40-35-210 (2003); State v. Taylor, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001). The party challenging a sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. Tenn. Code Ann. § 40-35-401, Sentencing Commission Cmts.

Tennessee Code Annotated section 40-35-103(1) (1997 & Supp. 2002) states that:

> Sentences involving confinement should be based on the following considerations: (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct; (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant; . . . .

Additionally, "[t]he potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of a term to be imposed. . . ." Tenn. Code Ann. § 40-35-103(5). The trial court may consider enhancing and mitigating factors when determining whether to grant a defendant alternative sentencing. Tenn. Code Ann. §§ 40-35-113, -114 (1997); State v. Bingham, 910 S.W.2d 448, 456 (Tenn. Crim. App. 1995).

The Defendant contends that he qualifies for a community corrections sentence under Tennessee Code Annotated section 40-36-106(a) and (c). The Defendant contends that he was convicted of a nonviolent felony offense and that he has a history of chronic alcohol abuse, drug

abuse or mental health problems that were reasonably related to and contributed to his conduct. Further he contends that his needs are treatable and that the treatment of his needs would best be met in community corrections. See State v. Grigsby, 957 S.W.2d 541 (Tenn. Crim. App. 1997). We find the Defendant's argument unpersuasive.

Initially, we note that the Defendant in the case under submission pled guilty to four class B felonies. Especially mitigated or standard offenders convicted of Class B felonies are not presumed to be favorable candidates "for alternative sentencing options in the absence of evidence to the contrary." Tenn. Code Ann. § 40-35-102(6). The purpose of the Community Corrections Act of 1985 was to provide an alternative means of punishment for "selected, nonviolent felony offenders in front-end community based alternatives to incarceration." Tenn. Code Ann. § 40-36-103. The community corrections sentence provides a desired degree of flexibility that may be both beneficial to the defendant and serve legitimate societal aims. State v. Griffith, 787 S.W.2d 340, 342 (Tenn.1990). Even in cases where the defendant meets the minimum requirements of the Community Corrections Act of 1985, the defendant is not necessarily entitled to be sentenced under the Act as a matter of law or right. State v. Taylor, 744 S.W.2d 919 (Tenn. Crim. App.1987). Tennessee Code Annotated section 40-36-106(a) provides that the following offenders are eligible for community corrections:

> (a)(1) An offender who meets all of the following minimum criteria shall be considered eligible for punishment in the community under the provisions of this chapter:
>
> > (A) Persons who, without this option, would be incarcerated in a correctional institution;
> > (B) Persons who are convicted of property-related, or drug/alcohol-related felony offenses or other felony offenses not involving crimes against he person as provided in title 39, chapter 13, parts 1-5;[2]
> > (C) Persons who are convicted of nonviolent felony offenses;
> > (D) Persons who are convicted of felony offenses in which the possession of a weapon was not involved;
> > (E) Person who do not demonstrate a present or past pattern of behavior indicating violence;
> > (F) Persons who do not demonstrate a pattern of committing violent offenses . . . .

Tennessee Code Annotated section 40-36-106(c) creates a "special needs" category of eligibility for a community corrections sentence:

> Felony offenders not otherwise eligible under subsection (a), and who would be

[2]These crimes are: "Assaultive Offenses;" "Criminal Homicide;" "Kidnapping and False Imprisonment;" "Robbery;" and "Sexual Offenses."

> usually considered unfit for probation due to histories of chronic alcohol, drug abuse, or mental health problems, but whose special needs are treatable and could be served best in the community rather than in a correctional institution, may be considered eligible for punishment in the community under the provisions of this chapter.

To be eligible for community corrections under the special needs category, the defendant must first be eligible for probation under Tennessee Code Annotated section 40-35-303. State v. Staten, 787 S.W.2d 934, 936 (Tenn. Crim. App. 1989). In Ashby, our supreme court encouraged the grant of considerable discretionary authority to our trial courts in matters such as these. 823 S.W.2d at 171; see State v. Moss, 727 S.W.2d 229, 235 (Tenn. 1986). "[E]ach case must be bottomed upon its own facts." Taylor, 744 S.W.2d at 922. "'It is not the policy or purpose of this court to place trial judges in a judicial straight-jacket in this or any other area, and we are always reluctant to interfere with their traditional discretionary powers.'" Ashby, 823 S.W.2d at 171 (quoting Moten v. State, 559 S.W.2d 770, 773 (Tenn. 1977)).

Under these guidelines, the evidence does not preponderate against the trial court denying the Defendant a community corrections sentence. Initially, the Defendant was not entitled to a presumption in favor of alternative sentencing as to his Class B felony convictions. See Tenn. Code Ann. § 40-35- 102(6). More importantly, however, the record demonstrates that there is a need to deter the Defendant from repeating his crime since, while on bond from an arrest for possessing crack cocaine for resale, the Defendant was arrested for sale of crack cocaine. Therefore, the trial court determined that there was a need to deter this individual Defendant from recidivating his crime. While deterrence necessarily exists in all cases and, therefore, should only be the sole consideration in denying community corrections in qualified cases, it is an appropriate consideration. See Ashby, 823 S.W.2d at 170. If a defendant has a long history of criminal conduct, then personal deterrence by confinement may be necessary to protect society from that defendant. See Tenn. Code Ann. §§ 40-35-102(3)(B) and (5), -103(1)(A). Similarly, the trial court found that community corrections was inappropriate in light of the need to deter other members of the community from committing this crime. This is, again, an appropriate consideration. Ashby, 823 S.W.2d at 170. If the "'offenses are of such a serious nature that confinement is necessary to avoid depreciating that seriousness or if deterrence of others [likely to violate the criminal laws of this State] would be especially effective through confinement, then alternatives other than confinement may not be warranted.'" Id. (citing Tenn. Code Ann. §§ 40-35-102(1), (3)(A) and (5), -103(1)(B) and quoting State v. Fletcher, 805 S.W.2d 785, 787 (Tenn. Crim. App. 1991)). Finally, the trial found that community corrections was not appropriate in light of the fact that the Defendant's potential for rehabilitation was dismal in light of the fact that he reoffended while on bond. This is an appropriate consideration. See Tenn. Code Ann. § 40-35-103(1)(c), (5). Further, a community corrections sentence would not serve the interests of society. The proof established that the Defendant made his living as a drug dealer. The Defendant had another source of income as a taxi driver and yet he engaged in lengthy and extensive drug dealing. Accordingly, we hold that while the Defendant qualified for consideration of a community corrections sentence, the discretionary authority of the trial court, under these particular circumstances, would prevail and it did not abuse its discretion by determining that the Defendant did not qualify for community corrections pursuant to Tennessee Code Annotated 40-36-106(a).

The trial court also properly determined that the Defendant failed to prove an entitlement to community corrections under the "special needs" category of eligibility because, at the sentencing hearing, the Defendant never contended that he committed his offenses due to his chronic alcohol abuse and, in fact, testified that he had not used alcohol in over ten years. Further, the Defendant never asserted that he was addicted to cocaine or hydrocodone or that he had any mental problems. Accordingly, the trial court was within his discretion to determine that the Defendant was not eligible for community corrections pursuant to this section of the code.

III. Conclusion

After review of the issue before us, we conclude that the Defendant has failed to establish that his sentence was improper. Accordingly, the judgments of the Circuit Court for Bedford County are AFFIRMED.

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ROBERT W. WEDEMEYER, JUDGE